No. 79-521

In the Supreme Court of the United States

OCTOBER TERM, 1979

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,
PETITIONERS

v.

GTE SYLVANIA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 598 F.2d 790. The opinion of the district court (Pet. App. 77a-104a) is reported at 443 F. Supp. 1152. Earlier opinions of the district court are reported at 438 F. Supp. 208 and 404 F. Supp. 352 (A. 92-124).

JURISDICTION

The judgment of the court of appeals (Pet. App. 71a-76a) was entered on April 30, 1979. On July 20, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 28, 1979, and on August 21, 1979, he further extended the time to and including September 27, 1979. The petition was filed on that date and was granted on December 3, 1979 (A. 177). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. 2055(b)(1), applies to the disclosure of records by the Consumer Product Safety Commission pursuant to a request under the Freedom of Information Act.

STATUTE INVOLVED

Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. 2055(b)(1), provides:

> Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this chapter, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter. If the Commission finds that, in the administration of this chapter, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

STATEMENT

1. In 1972, Congress enacted the Consumer Product Safety Act, 15 U.S.C. 2051 *et seq.*, in order "to protect the public against unreasonable risks of injury associated with consumer products" and "to assist consumers in evaluating the comparative safety of consumer products" (15 U.S.C. 2051(b)(1) and (2)). The Act established the Consumer Product Safety Commission to carry out the statutory pur-

poses. 15 U.S.C. 2053. The Commission is empowered, *inter alia*, to collect and disseminate product safety information, 15 U.S.C. 2054(a)(1), to conduct research and tests on consumer products, 15 U.S.C. 2054(b)(1) and (2), to promulgate safety standards, 15 U.S.C. 2056, and to ban hazardous products, 15 U.S.C. 2057.

Section 6 of the Act, 15 U.S.C. 2055, regulates "public disclosures of information" by the Commission. In particular, Section 6(b)(1) requires that at least 30 days before the public disclosure of information pertaining to a consumer product, the Commission must notify the manufacturer and provide it with a summary of the information to be disclosed, if the product is to be designated or described in such a way as to permit the public to ascertain readily the manufacturer's identity. The Commission also must give the manufacturer a reasonable opportunity to submit comments regarding the information to be disclosed.

Section 6(b)(1) further requires that, prior to public disclosure, the Commission must take reasonable steps to assure that the product safety information, from which the identity of a product's manufacturer may be readily ascertained, is accurate and that disclosure is "fair in the circumstances and reasonably related to effectuating the purposes" of the Act. In addition, if the Commission finds that it has made public disclosure of inaccurate or misleading information that reflects adversely on a manufacturer's products or practices, Section 6(b)(1) requires that the Commission "publish a retraction" in a manner "similar to that in which such disclosure was made * * *."

2. In March 1974, the Commission initiated an administrative proceeding to examine the safety of television sets. See 39 Fed. Reg. 10929 (1974). In connection with that proceeding, the Commission obtained from respondents, who are television manufacturers, reports of television-related accidents (*e.g.*, fires, electric shocks, etc.). The Commission acquired this information (more than 120,000 pieces of paper) partly through requests and partly through special orders and subpoenas issued under 15 U.S.C. 2076(b)(1) and (3). Claims of confidentiality accompanied the information submitted by most of the manufacturers (Pet. App. 11a-12a).[1]

In June 1974, Consumers Union of the United States, Inc., and Public Citizen's Health Research Group filed a request under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), asking the Commission to disclose the television-related accident reports. The Commission disclosed those portions of the reports as to which no claim of confidentiality had been made. With respect to the rest, it directed the

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[1] To reduce the information obtained to manageable form, the Commission retained a private company to catalogue the accident data. In addition, a Commission consultant helped to process, analyze, and summarize the data. As a result of these efforts, "the Commission now has nine file cabinets containing information on 7,620 TV-related accidents, each of which is in a separate file folder under the manufacturer's name * * *." See A. 131.

manufacturers to substantiate their claims of confidentiality (Pet. App. 13a). The manufacturers responded by asserting that the information had been compiled in connection with an administrative investigation, that it was exempt from mandatory disclosure under Exemptions 4 and 7 of the FOIA, 5 U.S.C. 552(b)(4) and (7), and that disclosure would violate the FOIA and the Trade Secrets Act, 18 U.S.C. 1905 (A. 55-64).

On April 8, 1975, after further communication with the manufacturers and the requesters, the Commission informed the parties of its legal determination that the requested reports were not exempt from mandatory disclosure under the FOIA and that the Commission would therefore release the reports, excluding only the identity of accident victims and any documents subject to the attorney-client privilege or the attorney-work product doctrine (A. 65-76).[2] The Commission added that the release of the data would be accompanied by a statement that "the information could be misleading because some television manu-

[2] The Commission also announced that technical data submitted by the manufacturers would not be released if the data had "been kept confidential by the company and * * * might cause substantial harm to the company if released" (A. 65). The materials in this category included engineering studies and other reports prepared at company expense, not disclosed to the public, and discussing "manufacturing techniques, processes, and the like that are unknown to other TV manufacturers and not available from outside sources" (A. 76).

facturers maintained more complete accident records than other manufacturers" (A. 66, 134).[3]

3. In April and May 1975, respondents (12 television manufacturers) instituted separate suits in the United States District Court for the District of Delaware and three other federal district courts, seeking to enjoin the Commission and certain of its officers and employees from disclosing the television-related accident reports in response to the FOIA requests. The complaints reiterated the manufacturers' previous claims that disclosure would violate the FOIA and the Trade Secrets Act. The complaints also alleged, for the first time, that disclosure would violate Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. 2055(b)(1). Respondents asserted, *inter alia*, that the "information contained in the materials to be disclosed is inaccurate and misleading; and disclosure would not be fair in the circumstances or reasonably related to effectuating the

[3] In *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission*, 585 F.2d 1382 (1978), which also involved a suit to enjoin a Commission disclosure under the FOIA, the Second Circuit noted that the Commission had offered to include with the disclosed records in that case a statement by the manufacturer regarding alleged inaccuracies in the records. The court commended the procedure, stating that, although not required by law, "this procedure is a sensible and fair accommodation of the manufacturers' and labelers' interests and we encourage the Commission to continue the practice." *Id.* at 1388 n.28. The Commission has generally followed this procedure whenever a manufacturer or labeler of a consumer product has objected to this kind of disclosure.

purposes of the Consumer Product Safety Act" (see, *e.g.*, A. 31).

Respondents' suits were consolidated in the United States District Court for the District of Delaware. On October 23, 1975, the district court entered a preliminary injunction prohibiting the Commission from disclosing the requested documents. 404 F. Supp. 352 (A. 89-124). On December 8, 1977, the district court permanently enjoined the Commission from disclosing the documents. 443 F. Supp. 1152 (Pet. App. 71a-104a). The court rejected the Commission's contention that Section 6(b)(1) applies only when the Commission affirmatively undertakes to disclose information to the public and not when it merely complies with a request for information under the Freedom of Information Act. The court held that Section 6(b)(1) is applicable to disclosures in response to FOIA requests and that it is a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3). The court also found that the Commission failed to comply with the Section 6(b)(1) procedures in this case and that release of the accident reports would therefore be contrary to the Act (Pet. App. 97a-98a).[4]

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[4] The requesters, Consumers Union and the Health Research Group, chose not to intervene in the Delaware action (Pet. App. 18a). Instead, on May 5, 1975, they brought suit under the FOIA in the United States District Court for the District of Columbia seeking to compel the Commission to release the identical documents at issue in this case. That lengthy and "tortuous" litigation (*ibid.*), which is now before this Court in *GTE Sylvania, Inc.* v. *Consumers Union of the United States*, No. 78-1248 (argued Nov. 28, 1979), presents the question whether the District of Columbia Circuit erred in holding that the permanent injunction obtained by respondents in the District of Delaware does not bar the requesters from litigating their separate FOIA action in the District of Columbia.

Consumers Union and the Health Research Group appeared in this case for the first time in the court of appeals as amici curiae to argue that they were indispensable parties within the meaning of Fed. R. Civ. P. 19 and that respondents' complaints should therefore have been dismissed in their absence. The court of appeals rejected this argument (Pet. App. 20a-26a).

The court of appeals affirmed. The court declined to follow the decision of the Second Circuit in *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission*, 585 F.2d 1382, 1388-1389 (1978), which specifically held that "the procedures of Section 6(b)(1) do not apply when the Commission merely responds to a request under the FOIA." Instead, the court of appeals concluded from the language and legislative history of Section 6(b)(1) that "Congress did not intend that provision to apply only to Commission press releases, news conferences, publication of reports and other forms of 'affirmative disclosure' of information obtained under the Act" (Pet. App. 58a-59a). The court held that Section 6(b)(1) was "meant to protect manufacturers from the harmful effects of inaccurate or misleading public disclosure by the Commission, through any means, of material obtained pursuant to its broad information-gathering powers" (*id.* at 59a).[5]

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[5] In view of their conclusion that Section 6(b)(1) of the Consumer Product Safety Act prohibits disclosure of the

SUMMARY OF ARGUMENT

A. Compliance with Section 6(b)(1) of the Consumer Product Safety Act is not a prerequisite for a Commission response to a Freedom of Information Act request, because Section 6(b)(1)'s procedural protections are not needed and were never intended to apply in the FOIA context. Section 6(b)(1) was enacted to provide adequate safeguards when the Commission makes public disclosures of information at its own initiative in the course of carrying out its responsibilities under the Consumer Product Safety Act. In those situations, the Commission decides to disseminate consumer product safety information in order to educate the public about the dangers associated with the use of particular products and the best ways to avoid or minimize risks to health and life. The Commission explicitly or implicitly represents that it believes the disclosed information to be true and that the public should rely on it. In this context, when a governmental agency places its authority behind statements about a particular product, manufacturer, or labeler, the requirements of Section 6(b)(1) are meaningful and appropriate. The Commission must (1) give affected manufacturers

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television-related accident reports, neither the district court nor the court of appeals reached respondents' further contentions that the reports are exempt from mandatory disclosure under Exemptions 4 and 7 of the FOIA and that release of the reports would be an abuse of the Commission's discretion under the FOIA and would violate the Trade Secrets Act.

and labelers notice and an opportunity to comment before disclosure, (2) make reasonable efforts to assure that the information is accurate and that disclosure is fair under all the circumstances, and (3) publish an effective retraction if after disclosure the Commission discovers that the information is inaccurate or misleading.

But these requirements are wholly unnecessary when the Commission merely releases information in response to a FOIA request, and Congress never intended them to govern in that setting. The FOIA was designed to improve knowledge about and aid evaluation of the governmental process by opening agency action to public scrutiny. In responding to a FOIA request, an agency is obliged simply to release whatever materials it possesses and controls that are reasonably described in the request. The agency is not expected to, and does not, make any statement regarding the content of the documents released or the extent to which those documents reflect agency policy. No governmental approval or disapproval is expressed or implied. This general rule applies with special force when the requested materials are documents and reports generated outside the agency, as in the present case. Because neither the Commission nor any other federal agency makes any representation concerning the quality of the information disclosed in response to a FOIA request, Congress perceived no need to require that an agency disclosing documents under the FOIA take steps to ensure that the disclosure is fair and accurate. Section 6(b)

(1) should not be construed to impose such a requirement on the Commission.

This interpretation of the scope of Section 6(b)(1), derived from the different purposes of the Consumer Product Safety Act and the FOIA, finds substantial support in the disparity between the procedural details that ordinarily characterize agency responses to FOIA requests and those that would apply if the court of appeals' ruling were permitted to stand. Agency responses under the FOIA are required to be prompt and do not entail any inquiry into the accuracy of the requested records, the fairness of their disclosure under the circumstances, or the strength or legitimacy of the requester's interest in the records. The delay and additional investigation that the court of appeals' decision would impose would run counter to the policy objectives that the FOIA was enacted to achieve.

In addition, the internal organization of Section 6 of the Consumer Product Safety Act demonstrates that the requirements of Section 6(b)(1) do not apply in the FOIA context. Section 6(a) is addressed to the exemptions from mandatory disclosure under the FOIA and the withholding of information by the Commission. Section 6(b), by contrast, is not a withholding statute. It merely establishes certain procedures that the Commission must follow before it publicly discloses product safety information backed by the Commission's own authority and prestige.

Finally, application of Section 6(b)(1) in the FOIA setting would have serious practical consequences for the Commission's ability to perform its statutory duties. The court of appeals' ruling apparently would require that the Commission investigate the accuracy of each item of information requested under the FOIA and the fairness of disclosure in each instance. Congress could not have intended to impose such an administrative burden, which would give FOIA requesters an unwarranted measure of control over the Commission's use of its limited resources.

B. Section 6(b)(1)'s inapplicability to FOIA requests is further evidenced by the legislative history of the Consumer Product Safety Act, the Commission's consistent interpretation of the disputed provision, and subsequent action by Congress.

The legislative history of the Act demonstrates that Section 6(b)(1) was designed to avoid the evil of Commission-initiated disclosures of inaccurate or misleading information about particular products. During the congressional hearings on the relevant bills, business representatives expressed concern about the harm that manufacturers might suffer as the result of the release of inaccurate information "[i]ssued under the dignity and with the apparent imprimatur of the U.S. Government * * *." The witnesses testified that the danger would be particularly acute if affected parties were not first given an opportunity to comment on information that the Commission proposed to disclose on its own authority and with its endorsement. Section 6(b)(1) was the legislative response to this potential

problem. Congress never suggested that the provision should apply in the context of an agency response to a FOIA request.

Later legislative events confirm the view that the procedural requirements of Section 6(b)(1) are inapposite in the FOIA setting. During oversight hearings in January 1976, Representative Moss, the original sponsor of the Consumer Product Safety Act in the House of Representatives, expressed his agreement with the Commission's interpretation of the statute. Moreover, later the same year, when Congress amended the Act to prescribe the conditions under which the Commission may provide accident and investigation reports to other federal agencies and state and local health and safety authorities, the newly added provision explicitly made Section 6(b) applicable to public disclosures by agencies receiving information from the Commission. With equal explicitness, the accompanying conference report stated that Section 6(b) is not intended to apply to "disclosure[s] initiated by a specific request from a member of the public under the Freedom of Information Act." H.R. Conf. Rep. No. 94-1022, 94th Cong., 2d Sess. 27 (1976).

The contemporaneous and subsequent evidence of congressional intent fully accords with the consistent construction of Section 6(b)(1) by the agency charged with the responsibility for the statute's administration. Such a construction is entitled to deference even in the ordinary case, but the general principle is particularly compelling here. The statutory interpreta-

tion challenged by respondents was adopted by the administrators who first set the Consumer Product Safety Act's machinery in motion. Moreover, when Congress revisited and amended the statute, it not only left the Commission's practice undisturbed but embraced the agency's position and enacted an amendment that would produce a substantial statutory anomaly if the court of appeals' decision in the present case were sustained.

ARGUMENT

SECTION 6(b)(1) OF THE CONSUMER PRODUCT SAFETY ACT DOES NOT APPLY TO THE COMMISSION'S RESPONSES TO REQUESTS FOR INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

A. The Different Purposes of the Two Statutes and the Incompatibility of Their Procedures for Disclosure of Information Demonstrate that the Requirements Governing the Commission's Public Disclosures Under the Consumer Product Safety Act Were Not Intended to Apply In the FOIA Context

1. One of the primary tasks entrusted by Congress to the Consumer Product Safety Commission is the dissemination of information concerning possible safety hazards associated with particular consumer products and appropriate safety standards for such products. The theme of informing the public runs throughout the Act. Section 5(a)(1), for example, directs the Commission to maintain an Injury Information Clearinghouse "to collect, investigate, analyze, and disseminate injury data, and informa-

tion, relating to the causes and prevention of death, injury, and illness associated with consumer products * * *." 15 U.S.C. 2054(a)(1). Section 7(d)(3)(C) instructs the Commission to promulgate regulations requiring developers of consumer product safety standards to maintain publicly available records of the course of a given standard's development and the comments and information submitted in connection with that process. 15 U.S.C. 2056(d)(3)(C); 16 C.F.R. 1105.7(c). Section 15(c) empowers the Commission, if it determines that a product presents a substantial hazard, to order the manufacturer or any distributor or retailer of the product to notify the public of the defect and also to mail notice to each manufacturer, distributor, and retailer and to every person known to have purchased or received the product. 15 U.S.C. 2064(c). In an imminent hazard action brought by the Commission under Section 12 of the Act, one form of judicial relief explicitly contemplated by the statute is a "mandatory order" directing the defendant manufacturer, distributor, or retailer to give public notice of the serious risk associated with the product and also to notify past purchasers of the danger. 15 U.S.C. 2061(b). Section 27(j) of the Act requires the Commission to prepare and deliver a comprehensive annual report on its activities to the President and Congress and to include in that report a statement of "the extent to which technical information was disseminated to the scientific and commercial communities and consumer information was made available to the public * * *."

15 U.S.C. 2076(j)(7). Finally, Section 29(e) authorizes the Commission to share its accident and investigation reports with other federal and state agencies engaged in activities relating to health, safety, or consumer protection. 15 U.S.C. 2078(e).

As the foregoing review demonstrates, a substantial part of the Commission's activity in performing its statutorily prescribed duties involves the public disclosure of information regarding the safety of consumer products. Section 6 of the Act is addressed to the various forms of public disclosure undertaken by the Commission in the course of fulfilling these responsibilities.[6] In particular, the procedures required by Section 6(b)(1) were intended by Congress to ensure that the Commission, in exercising its public disclosure function under the Act, would disseminate reliable product information in a way that is fair to both manufacturers and the consuming public. Section 6(b)(1) is part of the Consumer Product Safety Act, and it applies only to disclosures made by the Commission in the course of performing its duties under that Act to gather information, analyze it, and report the results of its investigations to the public.

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[6] Of course, not every form of public disclosure described in the Act is subject to the requirements of Section 6(b)(1). Section 6(b)(2) of the Act expressly provides that paragraph (1) shall not apply to certain disclosures, including disclosures of information about products as to which the Commission has filed an imminent hazard action under Section 12 and disclosures "in the course of or concerning any administrative or judicial proceeding" under the Act.

Section 6 has no impact on disclosures that the Commission may make for other purposes, such as compliance with a request under the Freedom of Information Act, except to the extent that Section 6 (a)(1) expressly preserves the exemptions from mandatory disclosure contained in subsection (b) of the FOIA, 5 U.S.C. 552(b). This conclusion is hardly surprising. The FOIA is a completely different statute enacted at a different time and for a different purpose. The FOIA applies not only to the Consumer Product Safety Commission but to government agencies generally. The statute is concerned not with any particular set of substantive problems in society at large but with the operation of the federal government. To be sure, both the FOIA and the Consumer Product Safety Act provide for the disclosure of information to members of the public. But the kinds of disclosures envisioned by the two statutes and the reasons for those disclosures are wholly distinct.

As this Court has explained, the FOIA "seeks to permit access to official information long shielded unnecessarily from public view * * *." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). The congressional goal was " 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.' " *Department of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976), aff'g and quoting 495 F.2d 261, 263 (2d Cir. 1974). The statute was designed to let the public learn, to the greatest extent practicable, how the agencies of the federal government work: what information they collect and have collected, what decisions they have made and actions they have taken, and on what basis they have shaped their behavior. In short, the FOIA is concerned with informing the public about the governmental process, in order "to ensure an informed citizenry * * * and to hold the governors accountable to the governed" (*NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)); the statute does not seek to educate the public about particular substantive problems.

As a consequence, the substantive reliability of information disclosed in response to FOIA requests is of little or no relevance to the achievement of the statute's purposes. A government agency's response to a FOIA request must be reliable in the sense that it must accurately disclose the information that the agency possesses in connection with the subject matter of the request, but there is no requirement that the disclosed information itself be reliable. That is because the FOIA is intended to allow the public to discover what the government knows and what the government is doing; it is not designed to provide substantively correct answers to questions of public importance.

The congressional purpose underlying the FOIA contrasts sharply with the information dissemination function performed by the Commission under the Consumer Product Safety Act. The Commission's obligation under the Act is to inform the public as fairly and accurately as possible about the safety hazards associated with particular consumer products

and what measures ought to be taken to avoid or minimize the risks to life and health arising from the use of such products. The public need for reliable information on such matters, and the congressional expectation that the Commission will develop and disseminate reliable information in a way that is "fair in the circumstances and reasonably related to effectuating the purposes" of the Act, together explain the inclusion of Section 6(b)(1) in the statute. Congress sought to ensure that, whenever the Commission, in fulfilling its public education responsibility, proposes to distribute information about a particular consumer product, the affected manufacturers (and private labelers) will first be given an opportunity to comment on the disclosure and the Commission will then take "reasonable steps" to assure that the proposed disclosure is accurate and fair.

These procedural requirements make perfect sense when the Commission disseminates information at its own initiative and with its endorsement for the purpose of influencing public behavior with respect to particular consumer products. Educating the public is one of the Commission's major functions under the Act. Before lending its authority to a public announcement of product information, it goes without saying that the Commission should make a responsible effort to assure that the information is accurate. The critical factor in such a situation is that the Commission places its weight and official role behind the information and expects the public to rely on the

disclosure, in large measure because the Commission has made it. Under such circumstances, when the Commission in effect vouches for the accuracy of the information, the public is entitled to expect that the Commission has a reasonable basis for its position and, by the same token, manufacturers and private labelers have a right to insist that their products not be disparaged unfairly. Section 6(b)(1) is intended to address these legitimate concerns.

But the procedural requirements of Section 6(b)(1) simply have no place in the context of a Commission response to a FOIA request. In that situation, the Commission vouches for nothing. There is no official endorsement of a particular view; there is only a release, under statutory compulsion, of all documents that are reasonably described in the request and that happen to be in the agency's possession and control. 5 U.S.C. 552(a). The rationale for the inclusion of Section 6(b)(1) in the Consumer Product Safety Act is no more applicable when the Commission responds to a FOIA request than when any other federal agency responds to such a request. In neither event is the governmental response accompanied by anything remotely resembling an official "seal of approval." The agency simply releases the records it possesses, without comment, and the requester is left to interpret the records for himself. Indeed, the Commission, in order to make absolutely certain that no misimpression is created by its responses to the FOIA requests at issue in this case, has decided as a policy matter to append to those re-

sponses a statement that the information may be misleading because of variations in accident reporting policies among the different respondent manufacturers. See pages 6-7, *supra*.[7]

The Commission's disclosure of information under this statutory obligation is clearly distinguishable from the disclosures to which Section 6(b)(1) was intended to apply. In responding to a FOIA request, the Commission expresses no opinion and makes no attempt to influence public behavior. It does not attach the government's imprimatur to any position with respect to a particular product's safety. It merely performs a ministerial task intended to inform the public of the information in the agency's possession, not the completeness or the reliability of that information. The Commission implicitly represents only that the disclosed materials are all the materials within its custody and control that relate to the subject matter of the request; only as to this representation does the agency have an obligation to be accurate. A FOIA disclosure entails no statement concerning the conclusions that can or should be drawn from the information released, and since no

[7] It should be emphasized that a federal agency's decision to respond to a FOIA request is not discretionary. The lower courts in the present case have not yet decided whether the accident reports submitted by respondents fall within one or more of the FOIA's exemptions from mandatory disclosure (see note 5, *supra*), and the question currently before this Court therefore must be resolved on the assumption that no such exemption properly applies to the information now in dispute. In such a situation, the Commission, like any other federal agency, has no choice but to comply with a FOIA request.

such statement is involved, the disclosing agency has no obligation to guarantee that the information sought is reliable. This is particularly so where, as here, the requested reports were generated outside the Commission. Accordingly, the potential problem that Section 6(b)(1) was intended to avoid—substantive error by the Commission—cannot occur in the FOIA context, and the procedural protections provided in the statute therefore do not apply.

2. The conclusion thus derived from a comparison of the general purposes of the FOIA and the Consumer Product Safety Act is amply supported by reference to the incompatibility between the detailed provisions governing disclosures of information under the two statutes. Moreover, the internal structure of Section 6 itself strongly suggests that Congress did not intend the procedural requirements of Section 6(b)(1) to apply in the FOIA context. Finally, the additional administrative burden that the court of appeals' interpretation of Section 6(b)(1) would impose on the Commission's handling of FOIA requests would significantly hamper the Commission in its ability to achieve the statutory purposes identified in Section 2(b) of the Act, 15 U.S.C. 2051(b). We discuss each of these points in turn.

In the first place, the procedures mandated by Section 6(b)(1) cannot be reconciled with the manner in which federal agencies are required to release information under the FOIA. A primary aim of the latter statute is to ensure promptness in agency disclosure of requested information. 5 U.S.C. 552

(a)(3) directs federal agencies to make requested records "promptly available," and a later subsection requires each agency to "determine within ten days * * * whether to comply with [a FOIA] request" and to notify the requester "immediately" of the agency's determination. 5 U.S.C. 552(a)(6)(A)(i). The FOIA further requires the agency to resolve any administrative appeal of a refusal to disclose within 20 days after filing of the appeal. 5 U.S.C. 552(a)(6)(A)(ii).[8] By contrast, Section 6(b)(1) of the Consumer Product Safety Act explicitly contemplates a delay of at least 30 days to enable a manufacturer or private labeler to comment on a proposed public disclosure of information by the Commission in which the manufacturer's or labeler's products are identified and discussed. A substantial additional delay would probably result in many if not most cases from the Commission's further obligation, before product safety information may be disclosed under Section 6(b)(1), to "take reasonable steps to assure" the accuracy of that information and the fairness of disclosure under all the circumstances. See *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety*

[8] The FOIA permits these time limits to be extended "in unusual circumstances," but in no event for more than 10 working days. 5 U.S.C. 552(a)(6)(B).

The judicial review provisions in the FOIA also evidence the statute's concern for prompt disclosure. Subsection (a)(4)(C) directs a defendant agency to answer any complaint within 30 days, and subsection (a)(4)(D) exhorts the federal courts to give FOIA cases "precedence on the docket" and to "expedite[them] in every way." 5 U.S.C. 552(a)(4)(C) and (D).

Commission, 585 F.2d 1382, 1387-1388 (2d Cir. 1978).

Apart from the delay involved, Section 6(b)(1)'s requirement that the Commission make reasonable efforts to assure the accuracy of product safety information presumably implies a duty on the part of the Commission to revise and correct erroneous materials before their release to the public. Such a duty is inconsistent with a federal agency's more limited obligation under the FOIA simply to release identifiable agency records to any person who requests them. As this Court held in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975), the FOIA does not require an agency to create or edit records in any situation in which the agency would not otherwise be obliged to do so. The statute requires only disclosure of existing documents in their existing form. See also *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 192 (1975); *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 23-24 (1967).[9]

By the same token, Section 6(b)(1)'s requirement that the Commission determine, before the public re-

[9] The obligation to recast documents would also be contrary to the congressional purpose in enacting the FOIA. As noted above (see pages 18-19, *supra*), the FOIA was intended to inform the public of the "decisions their government is making" and "the basis on which those decisions are being made." S. Rep. No. 93-854, 93d Cong., 2d Sess. 5 (1974). If an agency's decisions are based on documents later shown to be inaccurate, it is the inaccurate documents, not reworked versions, that Congress sought to have disclosed.

lease of product safety information, "that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the Act]" inevitably entails agency consideration of factors that are completely foreign in the context of responding to a FOIA request. If applicable under the FOIA, the fairness and relevance inquiry described in Section 6(b)(1) would involve a weighing of the identity and interest of the requester and the likely use to which he would put the information sought.[10] Such concerns are impermissible in connection with FOIA requests. The latter statute directs that requested information be released to "any person," and it thereby "precludes consideration of the interests of the party seeking relief." *Soucie* v. *David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971). See *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 143 n.10; *Getman* v. *NLRB*, 450 F.2d 670, 677-680 (D.C. Cir.), stay denied, 404 U.S. 1204 (1971); *Wellford* v. *Hardin*, 444 F.2d 21, 24-25 (4th Cir. 1971); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1 (1966) (the FOIA "eliminates the 'properly and directly concerned' test of who shall have access to public records"). Under the FOIA, government agencies are not permitted to weigh equitable factors in connection with the release of requested materials, except to the extent those factors are comprised within one of subsection (b)'s enumer-

[10] For example, a request by a research scientist for product safety information might be treated differently from a request for the same information by a plaintiff in a products liability lawsuit.

ated exemptions from mandatory disclosure. *Federal Open Market Committee* v. *Merrill*, No. 77-1387 (June 28, 1979), slip op. 13.

Finally, Section 6(b)(1) provides that, when the Commission discovers that it has publicly disclosed "inaccurate or misleading information which reflects adversely upon the safety of any consumer product," it must publish a retraction in a manner similar to that in which the original disclosure was made. This requirement, too, is incompatible with the FOIA scheme. There is no continuing governmental obligation under the FOIA to investigate the reliability of records released, and no FOIA requester would regard the fact of release as an assurance of accuracy. Unlike the sorts of Commission-initiated disclosures contemplated by the Consumer Product Safety Act (see pages 15-17, *supra*), an agency that releases records in response to a FOIA request is unlikely to consider the matter further, and there is no significant probability in the ordinary case that the agency will discover inaccuracies or misleading statements in materials previously released. Section 6(b)(1)'s retraction requirement is simply inapposite in this situation.[11]

This incongruity between the provisions of Section 6(b)(1) and the FOIA's procedures for the release of agency records has an obvious explanation: the

[11] Indeed, the express language of the retraction provision in Section 6(b)(1) makes clear that the retraction requirement applies only to public disclosures by the Commission "in the administration of this [Act]," not to releases of information intended solely to comply with another federal statute.

Consumer Product Safety Act and the FOIA operate in different spheres and are designed to serve different values and to achieve different goals. The expedition required by FOIA is important to the legislative purpose of opening agency activity to effective public scrutiny; the 30-day notice period required by Section 6(b)(1) would not serve this end, but it is critical when the Commission intends to make a public disclosure of information backed by the authority of the agency. Likewise, the assurance of accuracy and fairness required by Section 6(b)(1) is unnecessary in the FOIA context (where, by definition, the Commission expresses no opinion) but is indispensable in the context of public disclosures under the Act (where, by definition, the Commission attempts to inform the public about consumer safety issues and to persuade the public to act in accordance with the information provided). The retraction requirement in Section 6(b)(1)'s final sentence is meaningless under the FOIA (because there is nothing to retract in that context) but is important under the Act (because it ensures that the Commission will not permit inaccurate or misleading information disclosed under its aegis to stand uncorrected).

In short, the requirements of Section 6(b)(1) are inextricably intertwined with the character of "public disclosures of information" by the Commission under the Act. The requirements make sense and operate properly when the Commission discloses product safety information accompanied by its endorsement. When such information is supported by the Commission and

released in accordance with the Commission's statutorily prescribed duties, Section 6(b)(1) controls. When no Commission approval is intended or implied, as in the FOIA situation, Section 6(b)(1) does not apply. As the Second Circuit has observed,

> this interpretation of section 6(b)(1) avoids a potential conflict between two statutes, and carries out the intention of both. The Commission may assist consumers by generating in a public forum information regarding consumer products after using the procedures of section 6(b)(1) to insure accuracy, and it may also comply with the FOIA and make prompt disclosure of documents on request.

Pierce & Stevens Chemical Corp. v. *United States Consumer Product Safety Commission, supra*, 585 F. 2d at 1388 (footnote and citation omitted).

This interpretation is also supported by the structure of Section 6 itself. Section 6(a)(1) explicitly preserves all the exemptions from mandatory disclosure under the FOIA, as provided in 5 U.S.C. 552(b). Section 6(a)(2) even goes beyond the FOIA's "trade secret exemption" (5 U.S.C. 552(b)(4)) and prohibits altogether disclosure by the Commission of information that "contains or relates to a trade secret or other matter referred to in [18 U.S.C. 1905] * * *." But Section 6(a) nowhere mentions or refers to the procedural requirements imposed by Section 6(b)(1). That is because those requirements were intended to apply, not to every release of information by the Commission, but only to public

disclosures bearing the Commission's imprimatur. Unlike the FOIA exemptions treated in Section 6(a), Section 6(b)(1) is not a withholding provision. The statute is designed, not to authorize the Commission to prohibit public release of certain product safety information, but to ensure that the Commission adequately safeguards the interests of affected parties before it lends its name and prestige to a public statement about a particular product. When the Commission releases information in some other capacity (*e.g.*, in responding to a FOIA request or a judicial subpoena), the requirements of Section 6(b)(1) do not come into play, because the rationale for their inclusion in the statute is not implicated.[12]

The practical consequences of the court of appeals' contrary conclusion should not be underestimated. The Commission receives nearly 8,000 FOIA requests

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[12] This interpretation of Section 6(b)(1) is further supported by the exception to the subsection's 30-day notice requirement in cases where "the Commission finds out that the public health and safety requires a lesser period of notice * * *." This exception makes little sense as applied to disclosures in response to a FOIA request, because such disclosures are the result of the Commission's statutory obligation to comply with the request rather than a Commission-initiated decision to assist the public. Hence, the term "public disclosure" in the subsection must be read to encompass only the disclosures to the public contemplated elsewhere in the Consumer Product Safety Act. See *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission*, *supra*, 585 F.2d at 1387 ("the phrase 'public disclosure,' used in the title to Section 6 and repeated several times in subsection (b)(1), does imply something more than simply furnishing information upon request").

annually. The vast majority of them request information regarding one or more particular products as to which the manufacturer's or labeler's identity can be readily ascertained. Indeed, the Commission estimates that 95% of the information it obtains (and presumably, therefore, a similar percentage of the information requested) relates to individual products or manufacturers. This information includes approximately 10,000 consumer complaints annually as well as information from other sources. By its nature, the bulk of the information received by the Commission is not self-verifying. The fairness and accuracy of a consumer complaint can rarely be determined from the complaint itself. Yet the court of appeals' ruling would forbid the Commission from complying with FOIA requests for such materials unless the Commission first takes steps in each case to determine whether each item of information requested is accurate and whether disclosure would be fair in the circumstances and reasonably related to the purposes of the Act.

Such particularized investigations (*e.g.*, to determine whether a complaining consumer was in fact injured as alleged and, if not, to correct his complaint) would require a substantial expenditure of administrative time and resources. While the precise practical impact of the court of appeals' decision cannot be calculated in advance, it seems beyond dispute that the ruling will require a significant reallocation of the resources that Congress appropriated for the Commission's substantive programs, such as the de-

velopment and enforcement of product safety standards. Moreover, the Commission cannot avoid this burden; compliance with the FOIA is mandatory. When a request is received, the Commission will have no choice but to undertake the sort of inquiry contemplated by the court of appeals' opinion—an inquiry that no other federal agency must undertake before responding to a FOIA request, no matter how inaccurate or damaging to a manufacturer the information in an agency record might be.[13] This burden will inevitably divert the Commission's attention from the tasks set for it by Congress and will thereby impair the Commission's ability to fulfill its statutory responsibilities. Congress, in enacting Section 6(b)(1), could not have intended to permit the Commission's agenda to be dictated to such an extent by the whim of FOIA requesters, whose purposes are often far different from those that the Commission was created to serve.

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[13] One qualification should perhaps be added to the statement in the text. The court of appeals' opinion may mean that, if the Commission lacks the resources to conduct the inquiry necessary to assure that information requested under the FOIA is accurate and its disclosure fair, the Commission may simply deny the FOIA request. See 5 U.S.C. 552(b)(3). This reading of the court of appeals' opinion would relieve the burden on the Commission discussed in the text, but it would do so at the price of precluding compliance with the FOIA. Congress did not intend that only accurate information would be released under the FOIA, and it did not apply such a requirement uniquely to the Commission in Section 6(b)(1).

B. The Legislative History of the Consumer Product Safety Act, the Commission's Long-Standing Interpretation, and Subsequent Amendments Confirm that Section 6(b)(1) is Inapplicable to Freedom of Information Act Requests

1. The conclusion that Section 6(b)(1) applies only to the Commission's voluntary dissemination of information pursuant to its statutory mandate under the Consumer Product Safety Act, and not to other disclosures such as those pursuant to FOIA requests, is supported by the legislative history of the Act. What is significant in understanding Congress' intent in enacting Section 6(b)(1) is the evil the statute was designed to prevent and the situation "as it was pressed upon the attention of the legislative body." *Holy Trinity Church* v. *United States*, 143 U.S. 457, 463 (1892). See *United Steelworkers of America* v. *Weber*, No. 78-432 (June 27, 1979), slip op. 5-6; *United States* v. *Wise*, 370 U.S. 405, 411 (1962).

Although the pre-enactment history of this legislation does not directly address the precise issue of statutory construction involved in this case, it does indicate that the principal concern underlying adoption of Section 6(b)(1) was the danger that the Commission might at its own initiative disseminate findings, reports, and other product information harmful to manufacturers without first assuring the fairness and accuracy of the disclosure. As a representative from the respondent General Electric Company explained at a House hearing:

> [T]he public dissemination of the information so gathered carries with it a heavy responsibility. Issued under the dignity and with the apparent imprimatur of the U.S. Government, it will be repeated, summarized and carried by the media and so be used in the market place under circumstances and in a manner which the government cannot control. If the information is premature, inaccurate or misleading, the consumers themselves will suffer. If it is identified with a company or a product, it can have serious impact upon reputation, good will and market place results. Accordingly, we urge that the power to disseminate information carry with it the responsibility to be sure of its accuracy and that truth in disclosure be the governing statutory principle.

Consumer Product Safety Act: Hearings on H.R. 8110, H.R. 8157, etc. Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st and 2d Sess. 1065-1066 (1971-1972). Other industry spokesmen expressed much the same fears. See *id.* at 306-307, 432, 446-447, 766, 910, 969, 1130, 1196-1197, 1210-1211, 1237, 1318. This concern also was emphasized by the Secretary of Health, Education, and Welfare in his testimony before the Senate Committee. See *Consumer Product Safety Act of 1971: Hearings on S. 983, S. 1685, and S. 1797 Before the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 122-124 (1971).[14]

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[14] During the debates on the House floor, Representative Crane offered an illustration of the need for careful scrutiny of consumer information prior to its voluntary release even as a preliminary official finding (118 Cong. Rec. 31389 (1972)):

> The Federal Trade Commission charged that Zerex was falsely advertised in a television commercial, charges which have since been proven to be untrue. The company, nevertheless, lost sales in 1971 and public confidence because of unfavorable publicity.
>
> What the FTC did was to call a press conference in November 1970 and make a "proposed complaint" against Du Pont, alleging, without proof, that the television commercial was misleading, that the antifreeze actually damaged automotive cooling systems, and that it had been inadequately tested. The Federal Agency then publicly threatened to ban the product.
>
> The commercial in question showed a man stabbing a can of Zerex and streams of antifreeze gushing out and then sealing up. After the FTC charged that this demonstration was phony, newspapers across the country carried stories of the Commission's condemnation of Zerex.
>
> Officials at Du Pont were not even informed of the FTC's action before the Washington press conference. Equally important is the fact that the FTC turned out to be wrong. It dropped the charge of false advertising. It dropped the charge that the product could cause damage. The FTC, in fact, found nothing wrong with the product in any way.
>
> The financial damage had, of course, already been done. Du Pont counted 160 newspaper stories after the initial FTC accusation and only 80, half as many, a year later when the Agency admitted it had been wrong. Twenty front-page stories appeared the first time. The FTC's error received no first page placements a year later.

Because information voluntarily disclosed by the Commission might convey the impression of official support, Congress chose in Section 6(b)(1) to require the agency to make a preliminary determination of accuracy and fairness prior to such release.

There was no similar concern, however, in regard to disclosures not initiated by the Commission. In describing the type of public disclosure to which Section 6 applies, for example, the House Report [15] discusses separately "information which [the Commission] disseminates" (H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 32 (1972))[16] and information that is released under the compulsion of the FOIA. Whereas the Commission must take steps to assure prior to any agency-initiated public disclosure "that the information which it disseminates is truthful and accurate" (*ibid.*), no such restriction is stated to exist for disclosures made to the public under the Freedom of Information Act (*id.* at 31). As examples of agency activity that would be subject to Section 6(b)(1), the House Report refers to information "released * * * to the news media" or "placed in the Federal Register" and to "publication[s]" (*id.* at 32). As discussed above (see pages 17-23, *supra*), in contrast to these types of disclosures, there is no official imprimatur attaching to materials disclosed under the FOIA, and the House Report accordingly does not suggest that such involuntary disclosures are subject to the requirements of Section 6(b)(1). See *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission, supra*, 585 F.2d at 1387.[17]

[15] The House version of Section 6(b)(1) was the one adopted by the Conference Committee (Pet. App. 41a). See H.R. Conf. Rep. No. 92-1593, 92d Cong., 2d Sess. 41 (1972).

[16] As Representative Moss reminded his colleagues on the House floor, the statute authorizes "the dissemination of educational information [by the Commission] to consumers to help them avoid accidents." 118 Cong. Rec. 31378 (1972). See, *e.g.*, 15 U.S.C. 2054(a).

2. Legislative developments subsequent to passage of the Act confirm that Congress did not intend Section 6(b)(1) to apply to disclosures other than those the Commission undertakes as part of its statutory responsibilities. In testimony before a congressional oversight committee, former Commission Chairman Richard O. Simpson explained that the Commission interpreted Section 6(b)(1) to be inapplicable to FOIA requests. Representative Moss then remarked, "As the primary author of both acts, I am inclined to agree with you." *Regulatory Reform—Volume IV: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 7-8 (1976).[18]

[17] The court of appeals noted that the Conference Report (H.R. Conf. Rep. No. 92-1593, 92d Cong., 2d Sess. 41 (1972)) discussed "in almost the same breath" (Pet. App. 53a) the requirements of Section 6(b)(1) and 6(a)(1), which preserves the statutory exemptions in the FOIA (5 U.S.C. 552(b)) for information obtained under the Consumer Product Safety Act (see 15 U.S.C. 2055(a)(1)). The fact that the Conference Report discussed these provisions together, however, hardly suggests that FOIA requests are subject to Section 6(b)(1), as the court of appeals assumed (Pet. App. 53a). The Conference Committee merely described the separate functions that the two sections perform. Perhaps more important, the language of the provisions is unchanged from the House bill that is explained more fully in the House Report discussed in the text.

[18] The court of appeals rejected this evidence of congressional intent, in part because "'[t]he remarks of a single

Thereafter, in enacting the Consumer Product Safety Commission Improvements Act of 1976, Congress addressed the question of the proper scope of Section 6(b)(1) and ratified the Commission's interpretation of that provision. In the 1976 legislation, Congress added Section 29(e) to the original Act to "prescribe[] conditions under which the Commission may provide accident and investigation reports to other Federal agencies or State or local authorities engaged in activities relating to health, safety, or

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legislator, even the sponsor, are not controlling in analyzing legislative history'" (Pet. App. 58a), quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). We do not contend that Representative Moss' understanding is controlling, although we do suggest that it is entitled to great weight in interpreting the language of the statute that he authored. See *Chrysler Corp.* v. *Brown*, *supra*, 441 U.S. at 311; *Simpson* v. *United States*, 435 U.S. 6, 13 (1978); *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 394-395 (1951).

The court below also found Representative Moss' interpretation of the Act to be of little probative value because "a proposed amendment to section 6(b)(2) that would have added the release of information by the Commission under the FOIA to the list of exceptions from the requirements of section 6(b)(1) * * * has never been reported out of committee" (Pet. App. 58a). But courts may not "draw the inference * * * that an agency admits that it is acting upon a wrong construction by seeking ratification by Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950). Accord, *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416-418 (1967). The failure to enact new legislation may suggest only that Congress, like the Commission, does not regard Section 6(b)(1) as applicable to FOIA requests and that an amendment is therefore unnecessary.

consumer protection." H.R. Conf. Rep. No. 94-1022, 94th Cong., 2d Sess. 26 (1976). See page 17, *supra*. In permitting the Commission to release certain information to these other government agencies, Congress prohibited the recipient agencies from disclosing "to the public any information contained in a report received [from the Commission] * * * unless with respect to such information the Commission has complied with the applicable requirements of section 6(b)" of the Act. Pub. L. No. 94-284, Section 15, 90 Stat. 510, adding Section 29(e) to the Consumer Product Safety Act, 15 U.S.C. 2078(e). Because the new Section 29(e) incorporates the requirements of Section 6(b) by reference, the Conference Committee explained the joint operation of the two provisions (H.R. Conf. Rep. No. 94-1022, *supra*, at 27 (emphasis supplied)):[19]

> The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees to

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[19] The court of appeals gave little weight to the Conference Committee Report, in part because the Committee's interpretation of Section 29(e) is not discussed anywhere else in the legislative history (Pet. App. 56a). But the fact that the explanation of Section 29(e) contained in the Conference Committee Report is not discussed or contradicted elsewhere in the legislative history is hardly grounds for rejecting the Committee's explanation. Conference Committee reports often contain detailed discussion of provisions not regarded as controversial in preceding debates, particularly where (as here) the provision at issue was not contained in the draft bill in one of the Houses (see Pet. App. 56a).

supersede or conflict with the requirements of the Freedom of Information Act (5 U.S.C. 552 (a)(3) and (a)(6)). *The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act.*

This Court should not reject the Commission's long-standing interpretation of Section 6(b)(1), which Congress ratified in enacting Section 29(e). The Commission has consistently construed Section 6(b)(1) to apply only to agency-generated disseminations of product safety information and not to FOIA disclosures. This view is formalized in proposed Commission regulations. 42 Fed. Reg. 54304 *et seq.* (1977). An agency's interpretation of its own enabling legislation should not be overturned unless there are "compelling indications" that the interpretation is wrong. See, *e.g.*, *Miller* v. *Youakim*, 440 U.S. 125, 143-144 (1979); *Zenith Radio Corp* v. *United States*, 437 U.S. 443, 450-451 (1978). This is particularly so where, as here, the agency's interpretation is a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933), quoted in *Zenith Radio Corp.* v. *United States*, *supra*, 437 U.S. at 450.

The Court should be especially reluctant to set aside the Commission's view in this case because Congress

"has revisited the Act and left the [agency] practice untouched." *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974). As the Court recently remarked in *United States* v. *Rutherford*, No. 78-605 (June 18, 1979), slip op. 8-9 & n.10, "once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." Accord, *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 6; *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978). Here, of course, Congress not only has not altered "the agency's interpretation * * * [but has enacted] subsequent legislation declaring the intent of an earlier statute * * *." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

When an act of Congress is amended, "[t]he original section as amended and the unaltered sections of the act * * * relating to the same subject matter, are to be read together. The act * * * should be construed as to future events as if it had been originally enacted in that form." 1A C. Sands, *Sutherland Statutory Construction* § 22.35, at 197 (4th ed. 1972) (footnotes omitted). At the time Congress added Section 29(e) to the Act in 1976, it made clear its intent that Section 6(b)(1), which is incorporated by reference in the new provision, should apply only to public disclosure "initiated by the [Commission]" and is inapplicable to information obtained from the Commission by other agencies and the public under the

Freedom of Information Act. H.R. Conf. Rep. No. 94-1022, *supra*, at 27. In order for the amended and unamended provisions of the Act to have a "meaning * * * consistent with each other" (*Blair* v. *Chicago*, 201 U.S. 400, 469 (1906)), Section 6(b) must be understood to have the meaning ascribed to it by Congress in enacting Section 29(e).[20] Indeed, if the information involved in this case had been given to another federal agency under Section 29(e), the Conference Committee Report makes clear that the other agency would be required to disclose the information in the event of a FOIA request (subject, of course, to possible FOIA exemptions) without any need for compliance by the disclosing agency or the Commission with Section 6(b)(1). Under respondents' interpretation of the Act, however, the Commission itself would be forced to satisfy Section 6(b)(1) before complying with the identical FOIA request. Section 6(b)(1) should not be interpreted to create such an inconsistency in the statutory scheme.

In sum, every reference point in the interpretive process—the "overall structure of the Act, Congress' statements of purpose and policy, the legislative history, and the text of" Section 6 (*Board of Education* v. *Harris*, No. 78-873 (Nov. 28, 1979), slip op. 10)—supports the conclusion that Section 6(b)(1) of the Consumer Product Safety Act does not apply to information disclosed by the Commission pursuant to a request under the Freedom of Information Act.

[20] The court of appeals thought that this principle is inapposite here because "section 29(e), by its terms, does not interpret the scope of section 6(b)" (Pet. App. 55a). This is incorrect. By incorporating Section 6(b) by reference into Section 29(e), the proper meaning of Section 29(e) necessarily turns pro tanto on the meaning of Section 6(b). Thus, in adopting Section 29(e), Congress necessarily "interpret[ed] the scope of section 6(b)" (Pet. App. 55a) in order to establish the meaning of the new provision.

CONCLUSION

The judgment of the court of appeals should be reversed.

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